



## Getting the Most from Expert Testimony

By Jan Marie DeLipsey, Ph.D.

After debriefing hundreds of jurors after actual trials and mock trials and reviewing extensive jury research about expert testimony, it is painfully clear that more often than not, jurors (and sometimes judges) miss the point of expert testimony. This is not good news. It is even worse news when you consider all of the time, expense and effort that go into the presentation of expert testimony. Fortunately, the lawyer can do a lot to remedy this problem rather easily just by presenting this evidence in such a way that the jury or trier-of-fact “gets it.”

### “Getting It”: Strategic Trial Plan

Your trial plan should precede the final preparation of the expert. Before any hearing or trial, map out the three to five key questions (fewer is better) that the jury or trier-of-fact must answer in the case. Even lengthy and complex jury charges of 30 or more questions can be broken down into a few basic categories. These issues come together to form your broad case theme, i.e., your central focus. Although case strategy is not the topic of this article, the central focus of your case must be mapped out in order to present your expert powerfully.

You should next review your witness list. Under each key jury charge category, the witness who most strongly impacts that particular question should be listed.

Finally, outline three to five key points of testimony for each witness. In this way, the overlaps and gaps in evidence and testimony will become clear to you. Noting the evidentiary overlaps and gaps will help you narrow down the issues that need to be highlighted by the expert. There is no need to waste time having your expert testify about facts that can be established through either documents or other witnesses. Reserve the expert’s time for specialized knowledge not admissible through other avenues.

© 2007

*American  
Society of Trial  
Consultants*

1941 Greenspring Dr.  
Timonium, MD 21093

Tel: (410) 560-7949

Fax: (410) 560-2563

[www.TheJuryExpert.com](http://www.TheJuryExpert.com)

## WHAT'S INSIDE

**7**

### **What You Should Know About Jury Reform:**

See how juror notebooks can help jurors understand and follow evidence in complex trials.

**9**

### **Quick Courtroom Tips:**

Include jurors in your case by “staying open.”

**10**

### **The Importance of Place in Your Story:**

Learn how combining narrative and place can help you effectively tell your client’s story.

**The Jury Expert** is published monthly by the American Society of Trial Consultants, 1941 Greenspring Drive, Timonium, MD 21093. Phone (410) 560-7949; Fax (410) 560-2563; E-mail: [astcoffice@aol.com](mailto:astcoffice@aol.com); URL: [www.astcweb.org](http://www.astcweb.org). The annual subscription rate is \$99.95 and includes 12 monthly issues. Single copy price \$10.

**Editor:**

Teresa Rosado, Ph.D.

**Assistant Editor:**

Kevin Bouilly, Ph.D.

**Contributing Editors:**

Kevin Stirling, M.B.A.  
Debra Worthington, Ph.D.

**Content Development:**

Kristin Modin, Ph.D.

**Copy Editor:**

Elise Christenson

**New Market Director:**

Alexis Johnson

**Advertising Manager:**

Teresa Rosado, Ph.D.

**Typesetter:**

Newsletters, Etc.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent person should be sought. The publisher makes no warranty regarding the accuracy, integrity or continued validity of the facts, allegations or legal authorities contained in any public record documents provided herein, which said documents are provided for illustrative purposes only.

© 2007 American Society of Trial Consultants. All rights reserved. Reproduction prohibited without permission.

Because an expert's opinion is one of the most powerful weapons in your adversarial arsenal, use it with focus and planning. The folly of many trial lawyers is presenting every single opinion held by the expert—whether the opinions are directly relevant to the key jury questions or not. This “shotgun” approach produces unfocused and therefore weak testimony. Expert testimony will be stronger and have a greater impact when it is drawn down right on the bull's-eye of the target, i.e., the questions the jury must answer.

Although this preliminary work seems elementary, relatively few lawyers are able to articulate these points prior to trial. The key to getting the most out of your expert is to limit the information going to the jury to that which is essential in answering those few jury charge categories. Peripheral and nonessential information is noisy. It distracts the jury or trier-of-fact from the pivotal, meaningful evidence. You have to keep it simple.

Winning lawyers bring their own reality to the courtroom. Use the strategic trial plan to guide your litigation in getting the most from your expert:

- Keep it simple.
- Develop a central premise.
- Determine the general question(s) the jury must answer.
- Decide which witnesses, including experts, answer which questions most powerfully.
- Focus your expert's testimony to the jury questions and the central premise.

This strategic trial plan logically connects the different phases of your trial powerfully by employing principles of learning and persuasion research. Focusing the expert's

testimony is akin to using a spotlight to help jurors see your single central premise. The more complex the trial issue, the more you need to simplify the presentation of evidence.

One of the challenges of presenting your expert is the expectation of the trier-of-fact. Looking at your role from the jury's point of view, you are being paid to advocate a particular position. You don't have the credibility, at least in the beginning, that your expert will probably have. Therefore, your goal with the expert should be to steer through the testimony rather than to testify through your expert.

---

*Your goal with the expert should be to steer through the testimony rather than to testify through your expert.*

---

Use your expert to advocate your case position. The evidence and the facts that jurors are more likely to find credible come through the expert, not through a lawyer's testimonial styled questions. Think like a juror; ask questions you think a juror would pose. Play the devil's advocate. Don't be afraid to challenge your own witness. Challenge questions of your own expert are very powerful. They also take the wind out of the sails of your opponent.

### Spotlight on the Expert

Although the conceptual goal for the lawyer is to understand the expert's work thoroughly and in great detail, the ultimate goal in the direct testimony is to reduce the expert's opinion to as few points as possible. Ironically, if the subject matter of the expert's testimony is complex, then the testimony presentation needs to be even simpler. For example, in a case involving mental health testimony regarding mental anguish, you probably can cover five or six main points because lay persons are familiar with concepts of trauma, depression or anxiety. Conversely, in a medical malpractice case regarding unfamiliar and technical medical terms, the expert testimony points

need to be reduced to three or fewer.

Only with a thorough understanding of the expert's work and opinions can you accurately reduce the information to a few key points. This means that you, the lawyer, have to thoroughly understand the testimony in order to help teach it to your trier-of-fact. Such preparation arms you to frame appropriate questions back to your own expert in redirect, as well as be agile in the cross examination of the opposition's experts.

---

*Ironically, if the subject matter of the expert's testimony is complex, then the testimony presentation needs to be even simpler.*

---

Here are the basic rules that make your job in direct examination easier:

1. Use simple questions.
2. Use down-to-earth language.
3. Join up with the jury and judge using questions such as, "Could you help us understand?" and "Could you explain that to us?"
4. Ask the logical question you think the jury is silently asking.
5. If it can be seen, show it.

Use a written outline or actual questions to keep the testimony flow logical and focused, particularly amid objections. This also keeps you brief. Do what you can to enhance the expert's credibility. If the expert becomes confused or makes an error, buy some time for him or her to reorganize their thoughts. Fall on your sword by taking responsibility for a poor question, backtrack in the testimony, or return to a previous answer through a "hint" question.

The written outline is essential to an effective direct examination. The following techniques which combine principles of learning and persuasion will help you construct an effective outline.

### **Repetition-Looping**

Short-term memory is extraordinarily limited, though long-term memory capacity is impressive.

For example, when given a list of random letters or numbers, the average adult can recall about seven items (the range is five to nine). The phenomenon is so consistent that "seven" has been dubbed the "magic number" in social science research. This is why it is important to limit, as well as repeat, information.

The more complicated the topic, the more repetition will assist the jury in understanding and remembering the information. Therefore, you will want to repeat concepts, but not exact

questions, through the examination. Looping is a technique which incorporates an answer into the next question. It is not, though, a leading question. Looping takes the information or phrase right back to the jury again to increase the likelihood that they "get it."

Your expert needs to simply state the key points in understandable language. He or she should be attuned to the jury's capacity. When possible, core points need to be repeated, particularly with unfamiliar or complex information. In presenting your expert's opinions, repetition increases the likelihood that:

1. the evidence gets enough attention to be attended to;
2. it is stored in a meaningful way; and
3. it is recalled accurately.

You can use hypotheticals as a vehicle for repetition particularly with complex or technical testimony. You can also employ hypotheticals to summarize several facts or pieces of information.

### **Attention**

The likelihood of retaining information is greater when it is familiar. No information will be stored or retrieved from memory unless it first is attended to. For example, focus of attention is the core problem in inconsistency of eyewitness testimony. People remember different aspects of the same events as dictated by what demands their attention at the time.

© 2007  
American  
Society of Trial  
Consultants

For example, let's say a person is focused on making out a deposit slip at a bank and doesn't realize for several minutes that a robbery is in play. If later interviewed about the entire event, he or she will not be able to reliably report the initial stages of the crime, even under hypnosis. If her or his attention was on filling out the deposit slip rather than on the teller's window, no amount of memory-enhancing techniques will cue up more knowledge about the teller's window.

One cannot retrieve information from memory if it is not first purposefully and meaningfully stored. Meaningful storage requires that attention be given to the event or data.

### What Can You Do to Gain a Jury's Attention?

Think about the descriptors "bright" and "clear." Avoid routine for your key points. Use a variety of techniques to keep the testimony of the witness bright, interesting and clear.

*Vary exhibit types.* Use PowerPoint, video, hard boards, graphs, charts, or write on a large tablet. Avoid using only one exhibit type. Move around the courtroom, pick up a board, point to an overhead, stand up, or approach the witness on a key word or point. Movement breaks the monotony of the trial. When your expert makes the key points, write them on a large tablet or flash them on a video screen. This commands the jury's attention. Overusing exhibits numbs the audience. Use your demonstratives when you need punch. If they become routine, then they will have only a routine effect.

*Exhibits should capitalize on parallel modalities of learning.* It is a given that jurors will hear testimony. Using parallel modalities of communication will enhance the message. When possible, use visuals, models, photographs, documents and tactile exhibits with your expert. Parallel modalities not only command more attention from jurors, they hasten the learning process as well through repetition of the information, i.e., hearing and seeing, at the same time. Different people learn in different ways. Some are more auditory, some more visual, some tactile. Paralleling the ways in which data is presented will likely impact a greater number of jurors.

*ABC, XYZ.* A four-year-old's early recitation of the alphabet usually starts and ends well. It is the middle that often contains bizarre utterances like "the little minnow peed" (L-M-N-O-P). This phenomenon is known as the primacy and recency effect of learning. That which is presented first and last is more likely to be attended to, learned, and successfully retrieved. Start your expert's testimony with the most important issues. Place your problem evidence in the middle, and end with a summary.

*Use silence.* Nothing is more commanding than silence in the courtroom. Use it before a pivotal question or let an answer to a key question hang in silence before moving to the next question with your expert.

*Vary your intonation and rate of speech.* Similar to silence, variation in intonation and rate of speech will demand attention because it breaks the routine. Used sparingly, slowing or speeding your speech signals the jury something important is coming up.

Returning to the construction of the direct examination outline, it should be clear from the previous section that the jury needs to know where you are going before you start this journey. Put out those key points first. Punch them up. Then return, point by point, to go through more detailed information as needed. All of the expert's testimony should fall into these few key categories. When you finish with one category, use transition questions to a new category to alert the jury to a turn in the road. Try to put yourself in the jury box. If you were hearing this for the first time, what would you want to know, and what would be the next logical question? Testing the outline on people who have not had exposure to the case is very helpful in learning where your outline's gaps are too large.

You want a lean outline, with no irrelevant noise. Most of your expert's detailed work is not meaningful to the jury. As you are working with limited jury capacity, not to be misconstrued as mental limitations, you don't want to waste your precious attention time with meaningless information. Stick to the key points.

## When Do You Call the Expert?

Research about perception and the strength of perception (anchoring research) indicates that a jury develops an “operating” story about the case very early on, probably as early as voir dire. Once a story is anchored, evidence is interpreted as either supporting or not supporting the initial story. Anchoring research accounts for why there is usually an advantage in being the first to present evidence in a trial.

Events beyond your control, your expert’s schedule, the trial schedule, or sudden illness of a witness, often impact when you call your expert. Remember ABC, XYZ—first or last usually carries more punch. If you call the expert last, let the jury know it is the last witness. If the expert testifies first thing in the morning, jurors are more alert. If the expert is the last witness of the day, keeping their attention will be more challenging, but if the challenge is met, then jurors go home without interfering information in their minds. When new information is learned then, if there is a respite rather than a barrage of additional new information, new information is more likely to be retained. If your expert is the one to tell the story of the case, then the sooner your version is put forth, the better.

---

*Presenting challenge questions to your own expert is a great way to inoculate your case weaknesses.*

---

## Expert Attractiveness

There is no doubt that the physical attractiveness of your expert greatly impacts her or his credibility with the jury. A large body of social science research clearly indicates that attractive individuals are viewed as more successful, smarter, and more honest than their less attractive counterparts. Generally, jurors expect experts to be well-dressed, though not flashy. So take a look before you hire. Does the expert look honest? Is he or she pleasant? What is the expert’s demeanor toward your office staff? Answers to these questions will help you gauge their impression on a jury or even a judge.

## Expert Eye Contact

Research indicates that experts who do not

make eye contact with jurors are thought to be dishonest or deceptive. Though it may be awkward for the expert, looking to the jury when giving explanations or when discussing a pivotal case issue is an essential element of credibility. Needless to say, the time to test drive your expert should not be during the actual trial. Use your office staff for a test drive. Are they able to understand the testimony? Can they articulate the expert’s key points after the testimony? Do they find her or him credible? If not, then go back to the drawing board.

## Expert Opinion: Stronger is Better

Strongly stated expert opinions are the most persuasive. There is nothing worse than the \$400.00-an-hour waffling expert. Unfortunately, the more ethical experts are often the wafflers. Nevertheless, the expert needs to understand that jurors are looking for help in doing their job and are more comfortable with strongly stated positions. If there has to be

some waffling, then that particular issue should be addressed more strongly through another witness or should be thrown into the middle of the direct examination where it is not so noticeable. Don’t

leave the waffling as your last issue. If you have to deal with weak testimony, put it in the middle of the examination.

## A Cue Book

Your expert will be a better witness if he or she uses a cue book on the witness stand, especially in this age of Daubert-type challenges and cross-examinations. The cue book usually contains a summary of the expert’s work and relevant articles or papers to which the expert might refer or be crossed. It saves time, and jurors appreciate organized and succinct responses when possible.

## The Expert’s Background

Jurors really do pay attention to the expert’s background. Again, employing the primacy principle, the most important, not necessarily the most recent, aspects of the expert’s background should be presented first. Highlight and

© 2007  
American  
Society of Trial  
Consultants

summarize the background rather than going through specific events. For example, if an expert has taught and conducted research in six different colleges from 1980 to 2001, present the data as 21 years of experience as a teacher and researcher in colleges. Information summed up in this manner is more easily remembered than going through each college employment and the specific dates. Give your jury snapshots, the important ones and the ones which directly relate to your case premise.

### Inoculation

Inoculation is a valuable countermeasure to your opponent's attack. Inoculation should start in opening statement and, in some cases, voir dire. Inoculation generally means giving the jury a "taste" of your case weakness or anticipated criticism and then providing the counter argument (your position). Challenge questions of your own expert are a great way to inoculate your case weaknesses. And, as mentioned earlier, they weaken the cross-examination of the expert by your opponent.

### Summing It Up

The concepts in this article were assimilated from actual social science research and post verdict interviews with actual and mock juries. What may be the most familiar to you in the courtroom is not necessarily the most effective. Resist the urge to become like your case if it is a complicated matter. Rather, keep it simple. Streamline your complex cases, don't be afraid to limit your expert's testimony, and focus it like a laser on your trial goal. You'll like the results.



*Dallas-based psychologist Dr. Jan DeLipsey is president of Litigation Edge, a litigation consulting company specializing in helping lawyers with difficult and technical issues, witness*

*preparation and jury selection. Dr. DeLipsey can be reached at (214) 747-8500, or by e-mail at [DrDeLipsey@litigationedge.com](mailto:DrDeLipsey@litigationedge.com).*

## INTERESTED IN ADVERTISING IN THE JURY EXPERT?

It is with great pleasure that we offer the opportunity for you to advertise in *The Jury Expert*. This service allows you to communicate directly with our readership (trial attorneys and trial consultants).

If you are interested in advertising or have any questions, please contact Teresa Rosado (information below). You may also visit our web site at [www.thejuryexpert.com](http://www.thejuryexpert.com) to download the rate card and advertising contract in PDF format. We look forward to helping you promote your services in our publication.

### For more information contact:

Teresa M. Rosado, Editor  
(734) 944-0283 (Office)  
[trosado@juriscomm.com](mailto:trosado@juriscomm.com)  
[www.thejuryexpert.com](http://www.thejuryexpert.com)

© 2007  
American  
Society of Trial  
Consultants

STRATEGY

JURY RESEARCH

and  
GRAPHICS  
for ADR and Trial

[www.tsongas.com](http://www.tsongas.com)

**TSONGAS LITIGATION CONSULTING INC.**  
STRATEGIC PARTNERS IN TRIAL PREPARATION

# What You Should Know About Jury Reform

## Part II: Using Juror Notebooks

By **Debra L. Worthington, Ph.D.**  
and **Julie E. Howe, Ph.D.**

In the October 2006 issue of *The Jury Expert*, we discussed the effects of juror note-taking.<sup>1</sup> This month we address another up-and-coming jury reform—juror notebooks. In general, identical juror notebooks are provided to each juror in long and/or complex trials in which extensive evidential information is presented. They hold copies of documents and other information pertinent to the case, including exhibits and other relevant materials not subject to genuine dispute. Most new reforms are designed to encourage active participation of jurors, promote understanding and improve juror decision-making. Juror notebooks are no different.

Notebooks may include a wide variety of items such as:

- Preliminary jury instructions (later removed and replaced with final jury instructions)
- A short statement of parties' claims and defenses
- A list of witnesses by name, including identifying information
- Photographs of key witnesses
- Lists or indices of admitted exhibits
- Copies of key exhibits, or relevant portions
- Transcripts for jurors to read along (e.g., unintelligible audio-taped evidence)

- A glossary of technical terms
- Chronologies or timelines
- Curricula vitae of experts
- A seating chart for the courtroom that identifies all trial participants
- Final jury instructions<sup>2</sup>
- Paper for taking notes and/or asking questions

### Theory and Research

While juror notebooks are becoming increasingly common, it is interesting that little academic research has addressed their effectiveness. Intuitively, notebooks should help jurors organize, follow, recall and comprehend information. It makes sense that orienting jurors to the task at hand will reduce stress, increase interest and, most importantly, increase juror understanding. While limited, results of empirical studies and surveys of jurors and judges tend to support the above claims. For example, in a study by Michael Dann, Valerie Hans, and David Kaye, 92 percent of jurors reported that they actively used notebooks to review content.<sup>3</sup> Of these, 79 percent indicated the notebooks aided in their understanding and increased their recall of information. Importantly, the authors reported “jurors who were provided with notebooks scored significantly higher on the Juror Comprehension Scale than those not supplied with notebooks.”<sup>4</sup> However, it is important to avoid overwhelming jurors with too much information. At least one study found diminishing returns (in terms of comprehension and recall) when jurors experience information overload via a juror notebook.<sup>5</sup>

Several states have conducted their own pilot studies examining reactions to, and the usefulness of, juror notebooks (e.g., California, Ohio, Tennessee and Massachusetts). Taken as a whole, these studies overwhelmingly indicated that both jurors and judges find notebooks

<sup>1</sup> Volume 18, Issue 10. “What You Should Know About Jury Reform: Part I: Examining Juror Note-Taking.”

<sup>2</sup> Providing deliberating jurors with a copy of the final charge is approved in all federal circuits and permitted or required in at least 29 states.

<sup>3</sup> Dann, B. M., Hans, V. P., & Kaye, D. H. (2004, November). *Effects of selected jury trial innovations on juror comprehension of contested mtDNA evidence*. *National Institute of Justice Journal*, No. 255. Washington, D.C.: National Institute of Justice.

Available: [http://www.ojp.usdoj.gov/nij/journals/255/trial\\_innovations.html](http://www.ojp.usdoj.gov/nij/journals/255/trial_innovations.html)

<sup>4</sup> *Id.*, p. 16.

<sup>5</sup> Mott, N. (2000). *How Jurors Cope with Complexity: Defining the Issues*. (Unpublished doctoral dissertation). As cited in Dann, M., & Hans, V. (2004, Spring). Recent evaluative research on jury trial innovations. *Court Review*, 16.

helpful, especially in complex cases.<sup>6</sup>

Further, research findings relevant to juror note-taking may be generalized to juror notebooks. If allowing jurors to take notes increases juror understanding, it is logical to infer notebooks, which already contain the information jurors might want to take notes on (and arguably reported more accurately), should also increase juror understanding.<sup>7</sup>

### In Practice

Principle 13 of the ABA Principles for Juries and Jury Trials, "The Court and Parties Should Vigorously Promote Jurors' Understanding of the Facts and the Law," recommends that "in appropriate cases," jurors be supplied with identical trial notebooks.<sup>8</sup> Further, some states (e.g., New York) and the Second Circuit have adopted court rules concerning the use of juror notebooks.<sup>9</sup>

This principle and these rules regarding notebooks recommend:

1. jurors should be instructed about the purpose and the use of their notebooks;
2. parties be permitted to supplement the notebooks with additional material admitted into evidence; and
3. the notebooks are available to jurors during deliberations.

Additionally, the National Center for State Courts' website provides useful information about the practice of using juror notebooks.<sup>10</sup>

### The Impact

Practically, juror notebooks can be helpful in several ways. Consider the following advantages of notebooks:

- They provide a convenient way to manage the progression of a trial and keep the jury informed at all times as to relevant evidence.
- They help smooth the flow of evidence presentation and help jurors organize and understand information.
- They help jurors not only recall, but also understand the evidence and issues.
- They inform jury deliberations.

On the other hand, there are some concerns:

- Notebooks can be costly to compile in terms of the time, energy, and expense.
- Jurors may limit their consideration to the documentary evidence provided in the notebook, focusing less on other evidence such as key witness testimony.
- Jurors may be distracted and not focus on the evidence being presented at the time.
- Jurors may experience information overload.

While the use of juror notebooks is increasing in complex cases, it is not yet a widely practiced procedure.<sup>11</sup> Thus, there has been no formal

assessment of just how often courts are using juror notebooks, specifically what is contained in them or exactly how they are being included at trial.

Obviously, how and when juror notebooks are used is highly dependent on the individual case and up to the parties and judge. Deciding what to include in the juror notebooks may be the most daunting task for the parties and court. Which exhibits or relevant portions of exhibits should be copied and included? This requires significant

*Deciding what to include in the juror notebooks may be the most daunting task for the parties and court.*

<sup>6</sup> Dann, B. M., & Hans, V. (2004, Spring). Recent evaluative research on jury trial innovations. *Court Review*, 16.

<sup>7</sup> Worthington, D., & Howe, J. (2006, October). Examining Jury Note-taking. *The Jury Expert*, 18.

<sup>8</sup> ABA. Available: <http://www.abanet.org/juryprojectstandards/principles.pdf>

<sup>9</sup> Uniform Rules for N.Y.S. Trial Courts Section 220.12. *Consorti v. Armstrong World Indus.*, 72 F.3rd 1003, 1008 (2d Cir. 1995).

<sup>10</sup> National Center for State Courts. Available: [http://www.ncsconline.org/Juries/InnNotebooksFAQ.htm#\\_What\\_is\\_juror\\_notetaking](http://www.ncsconline.org/Juries/InnNotebooksFAQ.htm#_What_is_juror_notetaking)

<sup>11</sup> *Id.*

forethought and cooperation with opposing counsel.

### Improving Your Advocacy

Although it seems notebooks are a useful tool in complex trials, there still may be judges (and attorneys) who are reluctant. Attorneys who desire their jurors to fully understand their case issues should consider the complexity of their case and discuss the possibility of a juror notebook with opposing counsel and the judge at a pretrial conference.

The next step is to jointly decide what information should be included. Then decide who should be responsible for preparing notebooks that do not overload jurors with excessive quantities of information. The final notebook must be approved by the judge. Further, procedures should be clear for distributing additional “notebook-ready” documents during trial. Finally, the parties and judge should agree on jurors’ access to their notebooks during evidence presentation, recesses and deliberations.

### In a Nutshell

Common sense and some research tell us that juror notebooks help jurors understand and follow the evidence presentation in complex trials. With careful preparation and forethought, juror notebooks should aid juror comprehension and decision-making. Further research should be encouraged to provide additional evidence of their usefulness.

*Debra Worthington is an Associate Professor of Communication in the Department of Communication & Journalism at Auburn University. She may be reached by e-mail at [worthdl@auburn.edu](mailto:worthdl@auburn.edu).*

*Julie Howe, Ph.D., is a trial consultant with J. Howe Consulting in New York, NY. She may be reached by e-mail at [jhowe@jhoweconsulting.com](mailto:jhowe@jhoweconsulting.com).*

## Article Ideas?

Is there a topic you would like to see covered in *The Jury Expert*? Please feel free to contact me at the e-mail address below with article ideas.

Thanks for reading The Jury Expert!

Teresa Rosado, Ph.D., Editor  
[trosado@juriscomm.com](mailto:trosado@juriscomm.com)

## Quick Courtroom Tips

By  
Bob Gerchen

### Focus on Staying “Open” to the Jurors

In the theatre, actors are admonished to “stay open.” That means keeping your body positioned such that the audience can see your front, unless a dramatic element of the show dictates otherwise.

In the courtroom, remember that the jurors are the center of the audience and always “play” to them. When questioning a witness, turn your body so that you can face, and include, the jurors. Do the same at sidebars; instead of turning your back on the courtroom and talking directly to the judge, turn to the side so that the jurors can see your face and speak to the judge slightly over your shoulder.

It’s all about including the jurors in your case as much as possible.

*Bob Gerchen is the Director of the St. Louis office of Litigation Insights. He may be reached at (314) 863-0909 or by e-mail at [rgerchen@litigationinsights.com](mailto:rgerchen@litigationinsights.com).*

*For more information about Bob Gerchen’s book, **101 Quick Courtroom Tips for Busy Trial Lawyers**, visit [www.CourtroomPresentationTips.com](http://www.CourtroomPresentationTips.com).*

© 2007  
American  
Society of Trial  
Consultants

## A Communication Strategy: The Importance of Place in Your Legal Story

By Diane F. Wyzga, R.N., J.D.

In a third season episode of *The West Wing*, President Bartlett was ruing how completely awful things can go when there is a breakdown in something we take for granted. I think he might have been commenting on how he could not find the right pen, the proper pen that had the correct weight and heft in his hand. Mrs. Landingham, his secretary, used to put one in his jacket pocket every morning. And then she died. A writing pen every morning—you take it for granted until it no longer is there.

Stories are like that. We take stories for granted. Why? Humans are wired to grasp narrative. It's the exclusive tool we intuitively use to explain and define universal concepts and unique experiences.

Moreover, we believe what we understand. We understand what comes to us in a story that mimics our life experiences, our world views. Storytelling is such a natural, instinctual process that we take it for granted. And so we are hard-pressed to fully comprehend its uses, or more importantly, to explain its effects.

### Luxury or Necessity?

In fact, one trial consultant told me recently that the storytelling concept, while crucial, is so outside a lawyer's frame of reference, skill set, comfort zone, and experience that it seems little more than a luxury to which one can attach neither value nor importance. Would you agree? The truth of the matter is that if we do not learn the effects of story and practice its uses when we speak to jurors and judges and mediators and arbitrators and even our clients, we have lost the singular opportunity to get the action we desire out of any one of these listeners.

I want to show you the effect of knowing the importance of place in your legal story. Once you know and can relate to the importance of place you will get your listeners to follow you into that virtual location. There, in that place, they can see images and feel the sensations which trigger memories, their own memories, to create meaning for them. The meaning of the story you tell will lead them to action; i.e. win for you.

How do we develop the meaning of place? Stories typically begin with something we take for granted. And we ask the listener to take it for granted as well. Try this exercise for yourself. And then I'll give you a few tips.

---

*To ground a client's story in a setting, begin by listening for the answers to crucial underlying issues.*

---

### Exercise

Read the following aloud and while you do so "dare to pause"<sup>®</sup> at the end of each sentence:

A tree grows in Tecate, Mexico. \*\*\* A great tree grows at a cross roads in Tecate, Mexico. \*\*\* The tree is the only shade for miles around. \*\*\* It takes many days to reach the tree. \*\*\* Staring out through slitted eyes from under the protection of the tree you see vast blurred expanses of dry sandy culverts and rolling gray-green sagebrush, tangled roots, dragging debris. \*\*\* Through dry and crusted nostrils you smell heated air, maybe fear, certainly fear. \*\*\* Your skin crawls after days and nights without a bath; your feet ache in sneakers bound together with duct tape; you taste grit on a parched, swollen tongue and that last drop of warm iodine-scented water lingers on your imagination. \*\*\* Your ears listen left and right for the growl of advancing jeep engines but so far there is only scratching wind and the rustle above. \*\*\* A tree grows in Tecate, Mexico. \*\*\* The bandits and drug runners know this tree. \*\*\* And they know who seeks shelter here. \*\*\* They are the migrantes. \*\*\* The migrantes are the human rivers of Mexicans willing to cross this forbidding wasteland for even a chance at what beckons in the shimmering distance: work. \*\*\* Merely work. \*\*\* And for that they are willing to leave their place for this unknown place. \*\*\* Yet, in the land between known and unknown is the tree that grows at a crossroads in Tecate,

Mexico. \*\*\* The migrantes can see the tree long before they arrive. \*\*\* It is just as the stories have reported it. \*\*\* This tree flutters and waves in the hot wind. \*\*\* The leaves twist. \*\*\* But these leaves are no natural color. \*\*\* These leaves are pink and white and black and red and blue and gray. \*\*\* These leaves come in many sizes, from children's to grandmother's. \*\*\* These leaves are ladies' undergarments; they festoon the tree after the wearer has been raped by bandits who descend on the people clustered under the tree. \*\*\* After they have had their share the bandits run back into hiding in motorized vehicles. \*\*\* But first they fling the undergarments up on the branches of this tree. \*\*\* This tree they call The Trophy Tree. \*\*\* No matter what language you speak, degradation is spoken the same way. \*\*\* A tree grows in Tecate, Mexico.

### Practice Tips

My goal was to make the story real and therefore believable, understandable and compelling to you. We developed a sense of place by translating the images of what that place looks, feels, smells, tastes and sounds like. When you hold the story in all of your senses it resonates, becomes alive; it is no longer marks on a page.

### The Process

We began by taking for granted the notion of a growing tree. Next, we used the five senses to create an idea of place or location. And, more importantly, the relationship between this place and the characters in it: the migrantes. Then we upset that notion by gradually leading the listener to anticipate that there is something different about *this* tree. When we finally arrived at how this tree is different because of what it represents we feel some sensation that what we take for granted is broken down. That sensation translates into what the story might mean to the listener. My hope is that whether you want to round up the whole bloody lot of them, or believe that 10-foot fences encourage the sale of 12-foot ladders, this exercise demonstrated the effect of a story to establish place and meaning.

### In the Beginning

Clients come to our place: the law office or firm. When they sit across from our desk we

ask them questions from our list and write down the answers on our notepad. Attorneys who work with me know that sooner or later I will tell them, "Put down the paper and nobody will get hurt." In order to ground the client's story in a setting, we need to understand that we begin by listening for the answers to crucial underlying issues:

- What place did they occupy in the world?
- What place did they occupy when the event occurred that turned them from citizen to client?
- How does that place function in the story?
- What place do they now occupy in the world?
- What are the indicators that tell us about the locale of the story and its importance to the client?
- What is it about this place that binds the story to the client?
- What is it about this place that makes you want to return to it?

For example, Mrs. W. had a daughter, an unmarried single mom struggling to resolve, or at least get help with, her drug and alcohol issues. Despite the addiction and domestic violence trouble, she was doing a good job raising a child, interacting with friends and family members, living a life one might even consider relatively normal. Walking through a protected pedestrian crosswalk one afternoon she was struck by a bus. The bus driver turned left and didn't even realize what happened, not even with the thump of the body striking the fender. The resultant brain injuries left Mrs. W's daughter in a permanent vegetative state. The care facility where she lives and where in all likelihood she will remain for the rest of her days smells like urine and vomit and stale food. One can hear the moans of patients restrained, like her, in a bed. Walking into her room the first thing you notice is that this young woman has developed thick masculine eyebrows and the shadow of a beard. The caretakers say this is from the medications; a clean shave would help her look (and probably feel) more like a woman. You know that there is a light on, however dim, behind her eyes. You know because Thursday is chocolate pudding

day at lunch. And when the aide puts the spoon close to her mouth, she yawns over at it like a baby bird.

### Orienting Through the Senses

Lawyers are predominantly visual folks. To prompt yourself to orient to a place through the five senses, periodically close your eyes and focus on physical sensations in the various settings you inhabit. Listen to sounds. Become aware of scents and odors. Notice the flavors and textures of foods you eat. The more you are aware of your life, the more you become aware of your client's life and better able to bring their story *to* life.

The prosecutor in the Lacy Peterson case knew this. In closing argument she passed one of Lacy's blouses around the jury box. It was a blouse Lacy had worn in her home only a few days before she was murdered. It still held her scent. Holding the blouse, one juror commented, was like holding Lacy herself. This experience grounded the juror in Lacy's place.

#### Place Prompts to Ask Your Client:

- Tell me about this place beginning with the words, "One day."
- What is the season, the time of day, the temperature?
- What are your physical sensations?
- What sounds do you associate with the place?

- Can you smell anything?
- Does the place arouse any feelings in you?
- What can you see and are there limits to your range of vision? If so, what are they?
- If you turn around in this place, what distinguishing characteristics indicate any human presence?
- Change the point of view and tell me about this place through the eyes of the protagonist/defendant.

Narrative is central to the life of a lawyer. Place is central to the meaning of the client's story. By combining what we are naturally wired to do—use storytelling to shape and structure our impressions of the world—with a critical inquiry into the elements of story that interpret other people's lives and experiences, we can weave the story that is necessary to be told and heard.



*Diane F. Wyzga helps attorneys win more cases by developing their critical listening and persuasive communication skills. She teaches lawyers how to use storytelling techniques and principles to translate compelling case images into verdict action. With over 20 years' experience, Diane founded Lightning Rod Communications ([www.lightrd.net](http://www.lightrd.net)) to train attorneys to identify, shape and effectively deliver their stories using language with power, passion and precision. She may be reached at (949) 361-3035, or by e-mail at [diane@lightrd.net](mailto:diane@lightrd.net).*

## Thanks for reading *The Jury Expert*!

If you have recommendations for future content coverage, please feel free to contact me at the e-mail address below.

Teresa Rosado, Ph.D., Editor [trosado@juriscomm.com](mailto:trosado@juriscomm.com)

*American  
Society of Trial  
Consultants*

© 2007

### New Subscription/Renewal Form

Yes, please send me 12 months of *The Jury Expert*!

Please start my one-year subscription to *The Jury Expert* right away. I will pay the regular \$99.95 subscription rate. You'll pay all of my shipping and handling charges. I may cancel at any time for a complete refund of all unsent issues.

Name: \_\_\_\_\_ Firm: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail\*: \_\_\_\_\_

\*Providing your e-mail address allows you to manage your subscription online.

New Subscription:  Regular \$99.95    Renewal:  Regular \$99.95     Check enclosed. Make payable to:  
 Library \$199.95     Library \$199.95    "American Society of Trial Consultants"

Please charge my: \_\_\_\_\_ MasterCard    \_\_\_\_\_ Visa    \_\_\_\_\_ American Express

Full name on card: \_\_\_\_\_ Card #: \_\_\_\_\_ Exp. \_\_\_\_\_

**Or subscribe/renew online at [www.TheJuryExpert.com](http://www.TheJuryExpert.com)!**

American Society of Trial Consultants • 1941 Greenspring Dr., Timonium, MD 21093 • Tel: (410) 560-7949 • Fax: (410) 560-2563